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IN THE

Supreme Court of the United States

October Term, 1965

No. 434

AMADO DURAN CAMPOS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH I. STONE
Attorney for Petitioner
277 Broadway
New York, N. Y.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Amado Duran Campos, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on July 13, 1966.

A. The Opinion Below

The Circuit Court of Appeals affirmed on July 13, 1966 with reference to a lengthy opinion of Harold R. Tyler, Jr., United States District Judge, filed on April 7, 1966 and reported in F. Supp. (S. D. N. Y. 1966).

Judge Tyler's opinion is printed in the appendix attached to this petition. The printing of an appendix was waived in the Court of Appeals below.

B. Jurisdiction

The judgment of the Court of Appeals was entered on July 13, 1966.

No bail was set pending appeal and the defendant is presently in custody. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

The questions specifically raised by the petitioner, Amado Duran Campos, are:

1. *Draper* v. *United States,* 358 U.S. 307, should be reversed or if not reversed, modified with specific instructions to the lower courts.

2. The burden of proving an informer's reliability should rest entirely upon the prosecution as does the burden of proving any other affirmative fact.

3. Probable cause under the Fourth Amendment of the United States Constitution was not shown prior to the arrest of the defendant.

4. This Court should invoke Rule 52 of the Federal Rules of Criminal Procedure to show consistency between the de-

cision in *Jackson* v. *United States*, 353 F. 2d 862 (D.C. Circuit) and this case decided by the Second Circuit.

D. United States Constitution and the Statutes

United States Constitution, Fourth Amendment.

The statutes involved are: United States Code, Title 21, Section 176(a).

Rule 52(a) of the Federal Rules of Civil Procedure.

E. Summary Statement of Matters Involved

On August 2, 1965, the defendant, Amado Duran Campos, was arrested without a warrant by Agents Farrell and Gohde of the Federal Bureau of Narcotics. This arrest took place in the hallway of 601 West 112th Street, at about 11:30 P.M. (16, 17 R). Prior to making this arrest Agent Farrell had no personal knowledge concerning the defendant (22 R). Farrell based the arrest of Campos on what the informer, identified by Farrell as George Gonzales, told him. Judge Tyler agreed that Gonzales' statement formed the sole basis for their arrest (Appendix page 14).

According to Farrell the informer stated:

1. That the suspect was going to sell marijuana in the vicinity of 136th Street and Broadway (6R).

2. That the suspect was wearing a straw hat and various articles of jewelry (7R).

3. That the suspect had been drinking (7R).

4. That the suspect only had a small amount of marijuana left (6R).

Farrell testified that Gonzales had been an informer for approximately one year; that Gonzales had given him information leading to three arrests and had furnished leads on four occasions (8R). Farrell gave the defendant Gonzales' address as 987 Amsterdam Avenue, New York, New York (22R). Some of this information was furnished to Farrell on July 29, 1965 and other information was furnished on August 2, 1965.

Farrell described the surveillance of Campos on the night of August 2, 1965. There is no dispute that Campos was followed by both Farrell and Gohde from the vicinity of 136th Street to Broadway and 112th Street. Both Farrell and Gohde testified that Campos entered a phone booth and went into 601 West 112th Street and was arrested when he exited. Both Farrell and Gohde claim that a suitcase was taken from the defendant after his arrest (17, 63 R). Both Farrell and Gohde testified that the defendant appeared drunk (10, 18, 28, 29, 30, 71, 72 R). Gohde admitted that they discussed the arrest of the defendant before they saw him come out of the apartment with a suitcase (72-73 R).

George Gonzales, identified as the informer, was called as a witness by the defendant and stated that:

1. He never resided at 987 Amsterdam Avenue.

2. He once resided at 535 Amsterdam Avenue, but now lives at 1146 44th Drive, L.I.C., N. Y.

3. He was never an informer for the Federal Bureau of Narcotics and was not present with the Agents on August 2, 1965 (95, 97, 100, 101, 115 R).

4. Gonzales did not know Campos and had never seen him until he appeared in Court on November 30, 1965 (90 R).

The Court records indicate that Gonzales was sentenced on May 11, 1966 to Five (5) years of imprisonment for violating the Federal Narcotic Laws.

Judge Tyler found a clear conflict between the testimony of Farrell and Gonzales but Gonzáles was never indicted for Perjury.

F. Reasons for Granting Writ

POINT I

The burden is upon the Government to show why an arrest was made without a warrant. In this particular case, the Government claimed that information supplied them by a reliable informer was sufficient under *Draper* v. *U.S.* (*supra*). If we allow the Government to extend the *Draper* theory as far as to include this case, then we will permit warrantless arrests of anybody at any time with reliability established solely in the minds of the federal agents. An agent who is permitted to make a warrantless arrest, in his zealous pursuit of a would-be criminal, is taking law and order into his own hands. Probable cause is necessary before obtaining a warrant. Probable cause is often falsely created by crediting this arrest to an informer whom he terms reliable. The objective test of reliability is lost to a defendant if, as in this case, the agent claims that the informer is reliable and the informer, after being identified under *Roviaro* v. *U.S.*, 353 U.S. 53, takes the stand and denies either his reliability or the knowledge that the agents attributed to him concerning the defendant.

If this Court allows *Draper* (*supra*) to continue without further comment, then we have a situation where an agent

need not know the name of the person he is about to arrest nor where he lives nor what he is doing. The agent can simply pick up a description of a person he sees on the street, ex post facto and claim he has probable cause. If he (the agent) is successful enough to obtain contraband as a result of this arrest, then the defendant is left without a judicial determination, whether or not these descriptive facts were known to the agent prior to the defendant's arrest.

POINT II

This Court has consistently been liberal in weighing the interests of society with the interests of those accused of a crime. It realizes the difficulties that an individual defendant must have when opposing the United States of America in a criminal case. The Government, in a criminal case, has the burden of proving beyond a reasonable doubt the innocence or guilt of a defendant. They should also have the burden of proving beyond a reasonable doubt the objective reliability of an informer. In this case, there were no past records alleging or proving the reliability of this informer that could have been tested by the defense or accepted in open Court. *Roviaro* v. *U.S.* (*supra*) would be meaningless if identity is sought and furnished to the defendant only to have the defendant subpoena the informer who then claims he is not the informer and have the judge decide that it doesn't make much difference.

POINT III

Even if this Court does not wish to carefully scrutinize the majority decision in *Draper* (*supra*), then certainly they must decide whether or not this case was sufficient in and of itself to come within the majority opinion given in 1957. In *Draper* (*supra*), but not in this case, the name of the defendant was known and his description was perfect. His whereabouts and destination were allegedly known to the informer and relayed to the agents. The narcotics for which Draper was arrested were in a previously described duffel bag and this information was known to the agents. In this case, neither the informer nor the agents knew the defendant's name nor where he lived and the agents had no information whatsoever that the petitioner would transport marijuana in a suitcase or would leave any particular location with this suitcase. *Draper* should not be a catch-all for warrantless arrests without some confirmation by the agents. There has never been an affirmation of *Draper* where, as here, the informer specifically denies the information attributed to him.

POINT IV

Even if Agent Farrell's testimony is accepted, Agent Farrell, at the time he made the arrest, could not have had reasonable grounds to believe that the informer had any personal knowledge of what he attributed to the informer. The record indicates (24R) as follows:

> "Q. You testified on direct examination, did you not, that in your conversations with this Gonzalez he believed the suspect had large amounts of marijuana; is that your testimony? A. That's what he told me.

"Q. He believed? In other words, what you are saying is that Gonzalez never had any positive knowledge of whether or not this defendant had marijuana?

"Mr. Hawke: Objection, your Honor, to the form of the question.

"The Court: I think the witness can answer that very simply.

"The Witness: Your Honor, can I have the question repeated?

"(Question read.)

A. Frankly, I could not say."

Farrell further stated (9R) that he only had "a general impression of reliability." If Farrell was not sure whether the informer, if he was an informer, had positive knowledge and Farrell alone only had a general impression of reliability, then this case cannot be sustained under *Draper* v. *U.S.* (*supra*).

Rule 52(a) of the Federal Rules of Civil Procedure was utilized by Honorable J. Skelly Wright, Circuit Judge, District of Columbia Circuit in *Jackson* v. *U.S.* (*supra*). In that case, Judge Wright stated:

"Of course, if an officer obtained a warrant before making a legal along with an illegal arrest, the detailed information he allegedly received would have been presented to a neutral judicial body and recorded in an affidavit. We might then be compelled to accept the argument that he acted lawfully as to one person and unlawfully as to the other. But where he has not obtained a warrant, has not secured judicial confirmation of his possession of the description and thereby obviated the necessity of any speculation

as to the true facts, this failure on his part should operate against acceptance of his testimony. The Supreme Court has stated that the warrantless arrest will be more closely scrutinized than one based upon a warrant. United States v. Ventresca, 380 U.S. 102, 106, 109 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); see Wong Sun v. United States, 371 U.S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). One reason for this may well be the possibility that officers will fabricate evidence after the arrest to justify their acts, and the difficulty of proving such fabrication. It is true that we do not guard against after-the-fact fabrication in all cases by requiring that a warrant be obtained whenever practicable. But this does not preclude us from attaching significance to the failure to obtain a warrant in appropriate cases. If anything, our decision not to impose a blanket rule requires us to scrutinize more closely the testimony in cases involving warrantless arrests."

Judge Wright's decision would be in conflict with the Second Circuit decision affirming this case. Therefore, the Supreme Court of the United States should grant certiorari to carefully review Judge Tyler's factful determination and eliminate the existing conflicts between two judicial circuits.

CONCLUSION

The petition for certiorari should be granted and this Court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

JOSEPH I. STONE
Attorney for Petitioner
Member of the Bar of the
Supreme Court of the
United States
Office & P.O. Address
277 Broadway
New York, New York 10007

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 468—September Term, 1965.

(Argued June 24, 1966 Decided July 13, 1966.)

Docket No. 30616

UNITED STATES OF AMERICA,

Appellee,

—v.—

AMADO DURAN CAMPOS,

Defendant-Appellant.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from a judgment of conviction for concealment of marihuana in violation of 21 U. S. C. §176a, entered in the District Court for the Southern District of New York after trial before Edmund L. Palmieri, *Judge* and a jury.

Affirmed.

Appendix A

JOSEPH I. STONE, New York, N. Y. (Stone & Diller, New York, N. Y., with him on the brief), *for the appellant.*

ROGER J. HAWKE, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y.), *for the appellee.*

PER CURIAM:

Appellant's sole point on this appeal from a narcotics conviction is that the District Court, Harold R. Tyler, *Judge,* erred in denying appellant's motion to suppress evidence obtained from a suitcase appellant was carrying at the time of his arrest. We affirm on the basis of Judge Tyler's opinion below. —— F. Supp. —— (S. D. N. Y: 1966).

APPENDIX B

Judgment

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 4, inclusive, contain a true transcript of the proceedings had in said Court, in the case of

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United States of America,

Plaintiff-Appellee,

against

Amado Duran Campos,

Defendant-Appellant.

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as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this first day of August in the year of our Lord one thousand nine hundred and sixty-six, and of the Independence of the said United States the one hundred and ninety-first.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 786

UNITED STATES OF AMERICA,

—against—

AMADO DURAN CAMPOS.

HON. ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York, by

ROGER J. HAWKE, Assistant United States Attorney.

STONE & DILLER, ESQS., by
JOSEPH I. STONE, ESQ.,
Attorneys for Defendant.

TYLER, *D.J.*

Amado Duran Campos, who was arrested as an alleged narcotics violator on August 2, 1965, moves pursuant to Fed.R.Cr.P. 41(3) to suppress certain evidence obtained from a suitcase he was carrying immediately upon his arrest. Hearings were held on this motion on November 17, November 22 and November 30, 1965. On the basis of the

testimony adduced and documents submitted at those proceedings, it is determined that the motion should be, and hereby is, denied.

At the outset, it is incumbent upon me to resolve the direct conflict in the testimony of Federal Narcotics Bureau agent Francis J. Farrell and the testimony of the alleged informer, Jorge Gonzalez, concerning certain dealings between the two up to and including August 2, 1965. Upon resolution of this issue, the question of whether the reasonable grounds ordinarily required for making a valid, warrantless arrest and search incidental thereto were present in this case may then be considered and decided.

On November 17, 1965, Farrell, one of three agents who had arrested Campos, testified that for approximately a year prior to July 29, 1965 he had had frequent dealings with one Jorge Gonzalez who was acting as an informer for the Bureau under his direction. Prior to July 29, 1965, Gonzalez had furnished Farrell information concerning narcotics violations which Farrell himself had verified and which had ultimately led to various arrests and prosecutions in the state and federal courts. Further, investigations currently were being conducted as a direct result of Gonzalez' information. Consequently, at least prior to July 29, 1965, Farrell was of the impression that Gonzalez was a reliable informer.

On July 29 and July 31, Farrell met Gonzalez in the area of 96th Street and West End Avenue, New York City, for the purpose of negotiating a sale between the defendant, whom Gonzalez had described to Farrell as being in possession of a large quantity of marijuana, and an undercover agent who would be introduced to Campos by Gon-

zalez. This initial stratagem was dashed when it was discovered that the agents could not then acquire the necessary funds to consummate an illicit sale.

In the early evening of August 2, 1965, however, Farrell again met Gonzalez who stated that the defendant still retained an appreciable amount of marijuana in his possession and that he could probably be located in the general vicinity of 136th Street and Broadway near the Oceanview Bar. Thereafter, the informant entered an automobile and drove to 136th Street and Broadway followed by Farrell in an automobile driven by Federal Narcotics Bureau agent Jack Gohde.

Upon arriving at 136th Street and Broadway, the agents observed the informant to enter his automobile and drive away. Closely followed by the agents, Gonzalez drove to 134th Street and Riverside Drive where he parked his vehicle and remained seated. Farrell, leaving the government vehicle, approached Gonzalez on foot. Farrell was told by Gonzalez that Campos had revealed to him that he, Campos, had a purchaser for the ten or twelve pounds of marijuana remaining in his possession. For Farrell's benefit, Gonzalez described Campos as being a male Cuban in his mid-thirties, approximately 5'8" in height and weighing approximately 160 pounds. Further, he said, Campos would be wearing a light colored Panama straw hat, a light blue short sleeve sport shirt, dark trousers and a large amount of jewelry, including several rings, an identification bracelet and a large medallion attached to a chain hanging around his neck. Finally, Campos could then be found in the general area of 136th Street and Broadway near the Oceanview Bar.

Appendix C

From 134th Street and Riverside Drive, Farrell and Gohde drove to the specified vicinity and parked their vehicle in an advantageous position for viewing the activities of 136th Street and Broadway. While seated in the vehicle, the agents spotted a man who precisely fitted the detailed description given to Farrell by Gonzalez. This man, as later events were to establish, was the defendant Campos.

The agents maintained their surveillance of Campos for several hours until they saw him enter a taxi at approximately 11:30 p.m. and proceed south on Broadway to 111th Street. Here Campos exited from the cab and entered a telephone booth on the corner of 111th Street and Broadway. After a short period of time, Campos left the telephone booth, walked across the street and entered an apartment house. At this point Farrell, Gohde and Klempner (another agent who originally had been following Campos on foot in the neighborhood of 136th Street and Broadway and had followed him to 111th Street in his own government vehicle) positioned themselves around the apartment house and maintained a surveillance of the building. Shortly, the defendant exited from the apartment house carrying a large suitcase. At this point the three agents converged on Campos and placed him under arrest. An immediate search of his person by Farrell failed to uncover any narcotics. Immediately, Campos was taken by Farrell and Gohde into the rear lobby of the apartment house from whence he had emerged; there the suitcase which he was carrying was searched by Gohde. This search revealed the several packages of marijuana which comprise the subject matter of this motion.

Appendix C

On November 30, 1965, Gonzalez took the stand and told a completely different tale. Gonzalez' testimony can be summarized in the following manner. He had initially met Agent Farrell in June or July, 1965. Their dealings consisted essentially of several telephone calls from Farrell to Gonzalez in which the agent had asked him for some information concerning possible narcotics violations. Gonzalez denied, however, that he had ever seen Campos until that day (November 30) and that he had ever described the defendant to Agent Farrell. Finally, Gonzalez disclaimed recollection of where he was on August 2, 1965.

Agent Farrell, recalled to the stand on November 30 after Gonzalez had completed his testimony, affirmed his earlier testimony of November 17.

Thus, the lines are starkly drawn. Farrell attests that on previous occasions he had had dealings with Gonzalez, finding him to be a reliable source of information, and that the informant had given the agents the information which led to the instant arrest. Gonzalez maintains that he never had been an informant for Farrell or for the Federal Bureau of Narcotics and that he gave Farrell no information concerning Campos.

Although no rubric can be laid down for determination of credibility, certain factors or considerations may guide the fact finder. Important among these is the right of a jury or judge, in passing upon a witness' credibility, to consider from all that transpired at the hearing or trial a witness' interest, bias, or prejudice; his character, conduct or habits; his testimony in comparison with other evidence, oral or documentary; the appearance, manner and demeanor of the witness while testifying; his apparent

frankness and intelligence; his capacity for consecutive narration of acts and events; the probability or improbability of the tale related by him; and the advantages he appears to have had for gaining accurate information on the subject. In short, as Judge Learned Hand once said in speaking for the court in *Dyer* v. *MacDougall,* 201 F. 2d 265, 269, 2 Cir. 1952, "the words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that the [trier of the facts] is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness."

In this light of the matter, it is my determination that the credible tale was told by Agent Farrell. His testimony seems the more reasonable, the more convincing and the more satisfying to the mind. Evaluating the testimony of Gonzalez, as one court instructs, "in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence", *Carbo* v. *United States,* 314 F. 2d 718, 749, 9 Cir. 1963, it must be discounted insofar as it conflicts with Agent Farrell's testimony.

Accepting Farrell's testimony as credible, the question remains as to suppression or not of the contents of the valise or suitcase. The admissibility of such evidence will depend, of course, upon a finding that the search was legal which, in turn, will depend upon whether the arrest, made without a warrant, was legal. As will be more fully developed hereinafter, I conclude that the agents had reasonable grounds for making the arrest. Finding the arrest, although made without a warrant, lawful and the subsequent

search of the defendant's person valid as made incidental to a lawful arrest, this motion to suppress the seized narcotics must be, and hereby is, denied.

Narcotics agents have statutory authority to make felony arrests without a warrant for offenses committed in their presence, or where they have "reasonable grounds to believe that the person to be arrested has committed or is committing such violation", 26 U.S.C. § 7607. The statute merely reiterates the constitutional standard, for it is the command of the Fourth Amendment that no warrants for arrests or searches shall issue except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See also *Draper* v. *United States,* 358 U.S. 307, 310 n.3 (1959). What will constitute "reasonableness" or "probable cause" in a given case must depend upon its specific facts. *United States* v. *Williams,* 336 F. 2d 183, 184, 2 Cir. 1964, *cert. denied,* 379 U.S. 857 (1964); *United States* v. *Wai Lau,* 329 F. 2d 310, 311, 2 Cir. 1964. Evidence required to establish guilt will not be necessary. *Brinegar* v. *United States,* 338 U.S. 160 (1949). Conversely, good faith on the part of the arresting officers will not be enough. Reasonable grounds will exist, it is said, if the facts and circumstances known to the officers would warrant a prudent man in believing that the offense has been committed. Strict enforcement of this constitutional standard protects both the officer and the citizen. If the officer acts with probable cause, he will be protected even though the citizen proves to be innocent. *Carroll* v. *United States,* 267 U.S. 132, 156 (1925). On the other hand, the citizen is protected

by the requirement that a warrantless search will be permissible only if the arrest is made with probable cause. *Carroll, supra,* at 155-56.

It is clear that in every case the government has the burden of establishing that the probable cause requirement has been met, *Wong Sun* v. *United States,* 371 U.S. 471, 479-80 (1963); *Carroll* v. *United States, supra; United States* v. *Rivera,* 321 F. 2d 704, 708, 2 Cir. 1963; *United States* v. *Dornblut,* 261 F. 2d 949, 2 Cir. 1958. The government, however, may not validate an initially invalid arrest by the fruits of the incidental search. The litmus paper of reasonableness must be applied when the arrest is made, and, unless it proves positive, the arrest will be illegal and its proceeds inadmissible. *United States* v. *DiRe,* 332 U.S. 581, 595 (1948).

To provide the "reasonableness grounds" for the arrest here, the government necessarily relies upon the uncorroborated information of Jorge Gonzalez, an informer who, on August 2, 1965 at least, was considered to be reliable. Any argument that the agents' recognition and subsequent surveillance of the defendant provided corroboration, of course, would be an exercise in circular reasoning.

But the Supreme Court and the Court of Appeals for the Second Circuit have agreed with the government's position that the uncorroborated statement of a reliable informer can support a finding of reasonable grounds for an arrest. *Draper* v. *United States,* 358 U.S. 307 (1959); *United States* v. *Salgado,* 347 F. 2d 216, 217, 2 Cir. 1965; *United States* v. *Robinson,* 325 F. 2d 391, 394, 2 Cir. 1963; *United States* v. *Garnes,* 258 F. 2d 530, 532, 2 Cir. 1958,

cert. denied, 359 U.S. 937 (1959). Accordingly, Gonzalez' information, especially when appraised in light of the lateness of the hour and the inherent danger of the removal or destruction of the merchandise involved in traffic of this kind, satisfied the reasonableness requirement and justified Campos' arrest without a warrant.

The propriety of a search of a person contemporaneous with or incidental to a lawful arrest to discover and seize evidence or proceeds of a crime long has been recognized in this country and in Great Britain. *Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Dillon* v. *O'Brien and Davis,* 16 Cox. C.C. 245. More particularly, the search without a warrant will be sustained where it is made incidental to a lawful arrest and contemporaneous therewith as to time and place. Both conditions must be present. *Preston* v. *United States,* 376 U.S. 364 (1964); *Carroll* v. *United States,* 267 U.S. 132 (1925). The search must be truly incidental to the primary purpose for the arrest and may not be used as an excuse to search for evidence to justify the arrest, *United States* v. *DiRe,* 332 U.S. 581 (1948), *United States* v. *Robinson,* 325 F. 2d 391, 394-95, 2 Cir. 1963. If truly incidental to a lawful arrest, the search may extend to objects under immediate control of the suspect. *Preston, supra* at 367; *Carroll, supra* at 158.

In keeping with the foregoing principles, and probable cause for Campos' arrest having been found, it seems clear that the search and seizure of the suitcase were truly "incidental" as to time and place. The facts that the suitcase was not searched at the precise moment and exact location of Campos' arrest but rather was examined and seized in

the public lobby of the apartment house within a few moments afterwards and a hundred feet or more away do not justify a contrary conclusion.

The motion is denied in all respects. It is so ordered.

Dated:
April 7, 1966.
New York, New York.

H. R. Tyler Jr.
U. S. D. J.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 434

AMADO DURAN CAMPOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) and of the district court (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1966 (Pet. App. B). The petition for a writ of certiorari was filed on August 11, 1966. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was probable cause for an arrest and incidental search without a warrant.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on a one-count indictment charging unlawful receipt of marihuana in violation of 21 U.S.C. 176a (R. 117, 183) and was sentenced to imprisonment for five years (R. 183). On appeal the conviction was affirmed (Pet. App. A).

The issue raised depends on the validity of petitioner's arrest which was challenged by pre-trial motion to suppress evidence obtained (R. 120-121).

Farrell, an agent of the Federal Bureau of Narcotics, testified that on the evenings of July 29 and July 31, 1965, he discussed with one Gonzalez the possibility of having Gonzalez introduce an undercover agent to the person who had told Gonzalez he had 130 pounds of marihuana for sale (R. 3-4, 24, 43). Prior to these meetings Gonzalez had worked for agent Farrell for about one year, during which period he had given information which led to four current investigations, the conviction of a narcotics violator in the state court, the conviction of one Daizi in the federal court, and the arrest of a third individual whose case was pending before the grand jury (R. 8, 110-111).

On each occasion Farrell checked the information furnished by Gonzalez and found it reliable (R. 8-9).

At about 9:00 p.m. on August 2, 1965, Gonzalez told Farrell he had seen the suspect over the weekend and believed that he still had an appreciable amount of marihuana in his possession. Gonzalez said the agents could locate the suspect in the vicinity of 136th Street and Broadway (R. 5). After agents Farrell and Gohde had followed Gonzalez to 134th Street and Riverside Drive, Farrell alighted from the government vehicle and walked over to speak to Gonzalez in his car (R. 5-6). Gonzalez told Farrell he had just met the suspect who said that he still had about 10 or 12 pounds of marihuana for which he had a customer that evening (R. 6-7, 44-45). Gonzalez described the suspect as a male Cuban in his mid-thirties, 5'8" in height and weighing 160 pounds. The suspect was said to be wearing a light colored panama straw hat, a light blue short sleeve sport shirt, dark trousers, a large amount of jewelry, including several rings, a large gold identification bracelet, and a medallion on a large gold chain around his neck. Gonzalez also stated that the suspect was carrying an umbrella and appeared to have been drinking heavily (R. 7-8).

Agents Farrell and Gohde drove to the vicinity of 136th Street and Broadway and parked across the street from the Oceanview Bar (R. 9-10). Agent Klempner kept surveillance on foot (R. 59-60). Almost immediately the agents saw, standing in front of the bar, a man (whom they identified in court as petitioner) who answered the description given by Gonzalez (R. 10-11, 57-58). For about two hours the

agents kept petitioner under surveillance as he walked up and down Broadway looking into various bars and restaurants and returning to the Oceanview Bar (R. 11-14, 58-60). At about 11:30 p.m. petitioner took a taxicab to a telephone booth on the corner of Broadway and 111th Street and made a telephone call (R. 14-16, 61). Petitioner then walked to an apartment house at 601 West 112th Street and, five or ten minutes later, he walked out of the building carrying a large suitcase. At this point he was arrested by agent Farrell and searched. He was taken into the building to the rear lobby where the suitcase was searched by agent Gohde and found to contain four packages of marihuana (R. 16-19, 62-63). The agents testified that persons who deal in large quantities of marihuana often transport it in a suitcase (R. 17, 62).

Gonzalez testified that prior to the date of the hearing he had never seen petitioner and had never given agent Farrell information concerning petitioner (R. 89). Gonzalez testified further that he never told Farrell that he knew someone who had marihuana for sale (R. 91), that he had never given Farrell information of any kind about possible narcotics violators (R. 95), and that he had never been an informant for the Bureau of Narcotics (R. 114).

The district court, in denying the motion to suppress, credited the testimony of agent Farrell as opposed to that of Gonzalez, and held that the arrest and incidental search were valid as based upon probable cause (Pet. App. C.). The court of appeals af-

firmed on the basis of the district court's opinion (Pet. App. A).

ARGUMENT

The courts below properly found that there was probable cause for petitioner's arrest without a warrant and the incidental search of his suitcase in which marihuana was discovered. The reliability of the informer Gonzalez had been established prior to the evening of the arrest since he had given agent Farrell accurate information on a number of occasions over a period of approximately one year—including information which led to the conviction of two narcotics violators. Gonzalez's repudiation, at the hearing on the motion to suppress, of his role as an informer (found false by both courts below) did not negate the fact that agent Farrell had good reason to believe that Gonzalez was telling the truth on the date of the arrest. The statement of a reliable informer can support a finding of probable cause. *Draper* v. *United States*, 358 U.S. 307; *United States* v. *Salgado*, 347 F. 2d 216, 217 (C.A. 2); *United States* v. *Robinson*, 325 F. 2d 391, 394 (C.A. 2).

There is no occasion for this Court to overrule *Draper* or hold it inapposite here. Just as in *Draper*, the information furnished by Gonzalez had always been found "accurate and reliable" (358 U.S. at 313). Although in *Draper* the informer had identified the suspect by name and had described a tan zipper bag he would be carrying, these distinctions are not of controlling importance. Here the complete

description of petitioner and the clothes and ornaments he would be wearing was sufficient for his identification. Though the informer had not stated petitioner would be carrying a suitcase, the agents knew from their police experience that large quantities of marihuana are frequently carried by suitcase.

The decision below is not in conflict with *Jackson* v. *United States*, 353 F. 2d 862 (C.A.D.C.), as petitioner suggests (Pet. 8-9). In *Jackson*, the majority of the court of appeals found the arresting officer's testimony concerning information allegedly obtained from an informer to be flawed with "serious inconsistencies," "contrary to human experience" and "inherently incredible" (353 F. 2d at 866-868). In the instant case, neither of the courts below impugned the credibility of the agent's testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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